

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

MICHAEL DAVID BENSON SR.,

Plaintiffs,

2:14-cv-00132-CL

v.

FINDINGS AND  
RECOMMENDATION

COLLETTE PETERS, et al.,

Defendants.

CLARKE, Magistrate Judge.

Plaintiff, an inmate in the custody of the Oregon Department of Corrections, filed a complaint under 42 U.S.C. § 1983 alleging violations of his civil rights arising out of an altercation with another inmate on January 24, 2012.

The state defendants now move for partial summary judgment on plaintiff's First and Third Claims for relief. (#32). Although plaintiff has filed a "Motion to Deny Defendants' Motion for Summary Judgment" (#39) he has not

responded to the merits of defendants argument or presented any evidence to create a material issue of facts as to those claims.

In plaintiff's First Claim for Relief plaintiff alleges that defendant correctional officers violated his rights by failing to prevent him from coming into personal contact with the other inmate, despite being told that they "hated each other" and that there would be violence if they encountered each other.

First Claim for Relief: Defendants argue that plaintiff's first claim is barred by the statute of limitation.

42 U.S.C. § 1983 does not contain a specific statute of limitations for constitutional torts. Therefore, federal courts "borrow" the state statute of limitations in 42 U.S.C. § 1983 actions. See, Wallace v. Kato, 549 U.S. 384, 387 (2007); Wilson v. Garcia, 471 U.S. 261, 266 (1985); Silva v. Crain, 169 F.3d 608, 610 (9<sup>th</sup> Cir. 1999); Vaughan v. Grijalva, 927 F.2d 476, 478 (9<sup>th</sup> Cir. 1991).

In Oregon, the two year statute of limitations for personal injury actions, O.R.S. 12.110(1) applies to civil rights actions under 42 U.S.C. § 1983. Sain v. City of Bend, 309 F.3d 1134, 1139 (9<sup>th</sup> Cir. 2002); Cooper v. City of Ashland, 871 F.2d 104, 105 (9<sup>th</sup> Cir. 1988); Davis v. Harvey, 789 F.2d 1332 (9<sup>th</sup> Cir. 1986).

Federal law determines when a cause of action accrues and the statute of limitations begins to run on a § 1983 claim. Wallace v. Kato, 549 U.S. at 388. A federal claim accrues when the plaintiff know or has reason to know of the injury which is the basis of the action. Morales v. City of Los Angeles, 214 F.3d 1151, 1154 (9<sup>th</sup> Cir. 2000); Bagley v. CMC Real Estate Corp., 923 F.2d 758, 760 (9<sup>th</sup> Cir. 1991); see also, DeAnza Properties X, Ltd. v. County of Santa Cruz, 936 F.2d 1084, 1086 (9<sup>th</sup> Cir. 1991); Vaughan, supra, 927 F.2d 486, 480 (9<sup>th</sup> Cir. 1991).

In addition, federal law controls when an action "commences" for the purposes of the statute of limitations. Sain, supra at 1136. Under FRCP 3, a 1983 action commences in federal district court for purposes of the statute of limitations when the complaint is filed. Id. at 1138.

Defendants contend: Plaintiff alleges that he told correctional officers "weeks" before the January 24, 2012 assault that they needed to prevent plaintiff from having personal contact with inmate McPhail. Plaintiff filed his complaint on January 24, 2014, which would be two years plus 'weeks' afterwards. Accordingly, this claim is barred." Defendants' Partial Motion (#32) p. 3.

A claim accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action. Morales,

supra. In this case, plaintiff allegedly advised correctional officers of potential violence "weeks" before the incident. However, he did not sustain any actual *injury* as a result of defendants alleged conduct or failure to act until he came into contact with inmate McPhail and they assaulted each other.

I find that plaintiff First Claim for Relief accrued on January 24, 2012, and that plaintiff commenced this action within the two year statute of limitations.

Defendants motion for summary judgment as to plaintiff's First Claim for Relief should be denied.

Third Claim for Relief: In his Third Claim for Relief, plaintiff alleges deliberate indifference to his serious medical needs by five TRCI employees after his altercation with McPhail.

Defendants argue that they are entitled to summary judgment as to this claim because plaintiff failed to exhaust administrative remedies as to this claim.

The Prison Litigation Reform Act requires that prisoners exhaust available administrative remedies before bringing a federal action concerning prison conditions. Griffin v. Arpaio, 557 F.3d 1117, 1119 (9<sup>th</sup> Cir. 2009) (citing 42 U.S.C. § 1997e(a)). Inmates are required to exhaust all grievance remedies before filing a Section 1983 action, including

appealing the grievance decision to the highest level within the grievance system. Wyatt v. Terhune, 315 F.3d 1108 (9<sup>th</sup> Cir. 2003); Bennett v. King, 293 F.3d 1096, 1098 (9<sup>th</sup> Cir. 2002); McKinney v. Carey, 311 F.3d 1198 (9<sup>th</sup> Cir. 2002).

It is uncontradicted in the record before the court that although plaintiff filed three grievances concerning the adequacy of his medical treatment following the January 24, 2012 altercation, he did not complete the appeal process as to any of those grievances. Therefore, plaintiff did not properly exhaust available administrative remedies as to the allegations in his Third Claim for Relief. There is no material issue of fact remaining as to plaintiff's third claim and defendants are entitled to judgment as a matter of law.

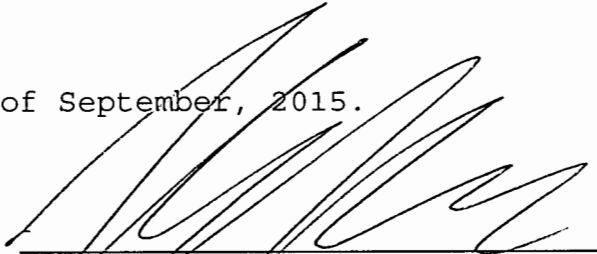
Defendants' Motion for summary judgment as to plaintiff third Claim for Relief should be allowed.

Defendants' Partial Motion for Summary Judgment (#32) should be denied as to plaintiff's First Claim for Relief and allowed as to plaintiff's Third Claim for Relief.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this

recommendation within which to file specific written objections with the court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 24 day of September, 2015.

  
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Mark D. Clarke  
United States Magistrate Judge